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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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10 Lawrence V. Clinkscale,) No. CV 11-1792-PHX-RCB (DKD)
11 Plaintiff,) **ORDER**
12 vs.)
13 C.O. Brown, et al.,)
14 Defendants.)
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16 Plaintiff Lawrence V. Clinkscale, who is confined in the Arizona State Prison
17 Complex, Special Management Unit I (SMUI), in Florence, Arizona, has filed a *pro se* civil
18 rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma*
19 *Pauperis*. Plaintiff also filed a motion for appointment of counsel. (Doc. 5.) The Court will
20 grant Plaintiff 60 days from the filing date of this Order in which to file a notice of
21 substitution of the actual names of unknown Defendants John Doe I, II, and III. Otherwise,
22 the Court will order Defendants Brown to answer Count I of the Complaint and will dismiss
23 the remaining Defendants and claims without prejudice. Plaintiff's motion for appointment
24 of counsel will be denied.

25 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

26 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
27 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
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1 The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The statutory
2 fee will be collected monthly in payments of 20% of the previous month's income each time
3 the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a
4 separate Order requiring the appropriate government agency to collect and forward the fees
5 according to the statutory formula.

6 **II. Statutory Screening of Prisoner Complaints**

7 The Court is required to screen complaints brought by prisoners seeking relief against
8 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
9 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
10 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
11 be granted, or that seek monetary relief from a defendant who is immune from such relief.
12 28 U.S.C. § 1915A(b)(1), (2).

13 A pleading must contain a "short and plain statement of the claim *showing* that the
14 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
15 demand detailed factual allegations, "it demands more than an unadorned, the-defendant-
16 unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
17 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory
18 statements, do not suffice." Id.

19 "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a
20 claim to relief that is plausible on its face.'" Id. (quoting Bell Atlantic Corp. v. Twombly,
21 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content
22 that allows the court to draw the reasonable inference that the defendant is liable for the
23 misconduct alleged." Id. "Determining whether a complaint states a plausible claim for
24 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
25 experience and common sense." Id. at 1950. Thus, although a plaintiff's specific factual
26 allegations may be consistent with a constitutional claim, a court must assess whether there
27 are other "more likely explanations" for a defendant's conduct. Id. at 1951.

28 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts

1 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
2 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
3 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
4 94 (2007) (*per curiam*)).

5 **III. Complaint**

6 Plaintiff alleges two counts for excessive use of force and violation of due process.
7 Plaintiff sues the following current or former employees of the Arizona Department of
8 Corrections (ADC): Director Charles L. Ryan, Deputy Warden Ron Credio, Associate
9 Deputy Warden Bradley, Corrections Officers Brown, and John Does I, II, and III. Plaintiff
10 seeks compensatory and punitive damages.

11 Plaintiff alleges the following facts in his Complaint: Plaintiff is Black and a
12 convicted sex offender. On November 4, 2009, Defendants Brown and Does I, II, and III,
13 called Plaintiff racially offensive names. Brown then ordered Plaintiff to “get in the dirt,”
14 i.e., to get on his knees; Plaintiff’s hands had already been cuffed behind his back. Plaintiff
15 “immediately” complied with Brown’s order. Brown then kicked Plaintiff in the back
16 causing him to “slam” into the gravel and ordered an unmuzzled guard dog to “attack”
17 Plaintiff. While the dog was biting Plaintiff, Brown punched and kicked Plaintiff and the
18 Doe Defendants held Plaintiff down and joined in kicking and punching Plaintiff. Plaintiff
19 suffered dog bites, scrapes, and cuts to his neck, head, face, back, and left arm.

20 On November 5, 2009, and March 31, 2010, Defendant Credio refused to provide the
21 names of the officers involved with the November 4 incident to Plaintiff. On December 4,
22 2009 and February 23, 2010, Defendant Bradley also refused to provide the names of the
23 officers to Plaintiff. On March 31, 2010, Defendant Ryan denied Plaintiff’s request for the
24 names of the officers.

25 **IV. Failure to State a Claim**

26 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
27 conduct about which he complains was committed by a person acting under the color of state
28 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.

1 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, to state a valid constitutional
2 claim, a plaintiff must allege that he suffered a specific injury as a result of the conduct of
3 a particular defendant and he must allege an affirmative link between the injury and the
4 conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

5 Further, to state a claim against a defendant, “[a] plaintiff must allege facts, not simply
6 conclusions, that show that an individual was personally involved in the deprivation of his
7 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual
8 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of
9 a policy, practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188
10 (9th Cir. 2001). In addition, there is no *respondeat superior* liability under § 1983, so a
11 defendant’s position as the supervisor of someone who allegedly violated a plaintiff’s
12 constitutional rights does not make him liable. Monell v. Dep’t of Soc. Servs., 436 U.S. 658,
13 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his
14 individual capacity, “is only liable for constitutional violations of his subordinates if the
15 supervisor participated in or directed the violations, or knew of the violations and failed to
16 act to prevent them.” Taylor, 880 F.2d at 1045. Further, where a defendant’s only
17 involvement in allegedly unconstitutional conduct is the denial of administrative grievances,
18 the failure to intervene on a prisoner’s behalf to remedy the alleged unconstitutional behavior
19 does not amount to active unconstitutional behavior for purposes of § 1983. Shehee v.
20 Luttrell, 199 F.3d 295, 300 (6th Cir. 1999); accord Mintun v. Blades, No. CV-06-139-BLW,
21 2008 WL 711636, at *7 (D. Idaho Mar. 14, 2008); Stocker v. Warden, No.
22 1:07-CV-00589LJODLBP, 2009 WL 981323, at *10 (E.D. Cal. Apr. 13, 2009).

23 Plaintiff alleges that Defendants Ryan, Credio, and Bradley violated his right to due
24 process by refusing to provide the names of the officers involved in the November 4, 2009
25 incident to Plaintiff. Liberty interests that entitle an inmate to due process are “generally
26 limited to freedom from restraint which, while not exceeding the sentence in such an
27 unexpected manner as to give rise to protection by the Due Process Clause of its own force,
28 nonetheless imposes atypical and significant hardship on the inmate in relation to the

1 ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995) (internal
2 citations omitted). Thus, “[a]s long as the conditions or degree of confinement to which the
3 prisoner is subjected is within the sentence imposed upon him and is not otherwise violative
4 of the Constitution, the Due Process Clause does not in itself subject an inmate’s treatment
5 by prison authorities to judicial oversight.” Montanye v. Haymes, 427 U.S. 236, 242 (1976).
6 A prisoner may challenge a disciplinary action which deprives or restrains a state-created
7 liberty interest in some “unexpected manner.” Ramirez v. Galaza, 334 F.3d 850, 860 (9th
8 Cir. 2003) (citing Sandin, 515 U.S. at 483-84)). But, a claim that prison officials “added
9 things” to an appeal to mask procedural errors does not, for example, meet this standard
10 because inmates lack a separate constitutional entitlement to a specific prison grievance
11 procedure. Id. (citing Mann, 855 F.2d at 640).¹

12 Plaintiff does not allege that any disciplinary charge was made against him or that he
13 was denied any right in connection with any disciplinary proceeding.² Rather, Plaintiff
14 contends that Defendants Ryan, Credio, and Bradley refused to tell him the names of the
15 officers involved with the November 4, 2009 incident absent a valid discovery request.
16 These Defendants’ refusals to provide that information to Plaintiff did not constitute an

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19 ¹ In analyzing whether a hardship is atypical and significant, three guideposts to
20 consider are: (1) the conditions of confinement; (2) the duration of the condition and the
21 degree of restraint imposed; and (3) whether the sanction will affect the duration of the
22 prisoner’s sentence. Ramirez, 334 F.3d at 861; Keenan v. Hall, 83 F.3d 1083, 1088-89 (9th
23 Cir. 1996). To determine whether an inmate is entitled to the procedural protections afforded
24 by the Due Process Clause, the Court must look to the particular restrictions imposed and ask
25 whether they “‘present the type of atypical, significant deprivation in which a state might
26 conceivably create a liberty interest.” Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995)
27 (quoting Sandin, 515 U.S. at 486). Plaintiff has not alleged any deprivation or restriction in
28 which a state might conceivably create a liberty interest.

29 ² Procedural due process safeguards in a prison disciplinary hearing require that the
30 defendant receive: (1) written notice of the charges, no less than twenty-four hours prior to
31 the hearing; (2) a written statement by the fact-finder as to the evidence relied on and reasons
32 for the disciplinary action and (3) a limited right to call witnesses and present documentary
33 evidence when it would not be unduly hazardous to institutional safety or correctional goals
34 to allow the defendant to do so. Wolff v. McDonnell, 418 U.S. 539, 565-66 (1974)

1 atypical or significant hardship in relation to the ordinary incidents of prison life. Moreover,
2 as discussed below, Plaintiff will be afforded the opportunity to learn these officers' names
3 through discovery. Because Count II fails to state a constitutional violation against Ryan,
4 Credio, or Bradley, both it and these Defendants will be dismissed.

5 **V. Claims for Which an Answer Will be Required**

6 In Count I, Plaintiff sufficiently alleges claims against Defendants Brown and Does
7 I, II, and III for the excessive use of force against him.³ Defendant Brown will be required
8 to respond to that count.

9 **VI. Service on the Doe Defendants Cannot Be Effectuated at this Time**

10 As noted above, Plaintiff sufficiently states a claim in Count I against the three Doe
11 Defendants. Rule 10(a) of the Federal Rules of Civil Procedure requires the plaintiff to
12 include the names of the parties in the action. As a practical matter, it is impossible in most
13 instances for the United States Marshal or his designee to serve a summons and complaint
14 upon an anonymous defendant. Thus, although Plaintiff has alleged claims with enough
15 specificity against the Doe Defendants to require an answer, the Court cannot direct that
16 service be made on the Doe Defendants at this time.

17 The Ninth Circuit has held that where identity is unknown prior to the filing of a
18 complaint, the plaintiff should be given an opportunity through discovery to identify the
19 unknown defendant, unless it is clear that discovery would not uncover the identities, or that
20 the complaint would be dismissed on other grounds. Wakefield v. Thompson, 177 F.3d
21 1160, 1163 (9th Cir. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)).
22 The Court will allow Plaintiff 60 days in which to discover the actual names of the Doe
23 Defendants, through *subpoena* or otherwise, and to substitute their actual names by filing a
24 "notice of substitution." See Wakefield, 177 F.3d at 1163. Failure to timely file a notice of
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27 ³ To the extent that Plaintiff complains of verbal abuse or harassment, he fails to state
28 a claim. Verbal harassment or abuse alone does not rise to a constitutional level. Somers v.
Thurman, 109 F.3d 614, 624 (9th Cir.1997); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th
Cir. 1987)).

1 substitution will result in the dismissal of the Doe Defendants without prejudice.

2 **VII. Motion for Appointment of Counsel**

3 As noted above, Plaintiff has filed a motion for appointment of counsel. (Doc. 5.)
4 Plaintiff seeks the appointment of counsel because his imprisonment and limited access to
5 legal resources, and knowledge of the law, will make it difficult for him to litigate this case.
6 He also alleges that he is indigent and has been unable to retain counsel. Counsel is only
7 appointed in a civil rights action in “exceptional circumstances.” Agyeman v. Corrections
8 Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004); Wilborn v. Escalderon, 789 F.2d
9 1328, 1331 (9th Cir. 1986); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). “A
10 finding of exceptional circumstances requires an evaluation of both ‘the likelihood of success
11 on the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
12 complexity of the legal issues involved.’” Wilborn, 789 F.2d at 1331; see Agyeman, 390
13 F.3d at 1103; Terrell, 935 F.2d at 1017. This case does not present exceptional
14 circumstances warranting the appointment of counsel. Accordingly, Plaintiff’s request for
15 appointment of counsel will be denied.

16 **VIII. Warnings**

17 **A. Release**

18 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
19 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
20 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
21 in dismissal of this action.

22 **B. Address Changes**

23 Plaintiff must file and serve a notice of a change of address in accordance with Rule
24 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
25 relief with a notice of change of address. Failure to comply may result in dismissal of this
26 action.

27 **C. Copies**

28 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy

1 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
2 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
3 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
4 may result in the filing being stricken without further notice to Plaintiff.

5 **D. Possible Dismissal**

6 If Plaintiff fails to timely comply with every provision of this Order, including these
7 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
8 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
9 comply with any order of the Court).

10 **IT IS ORDERED:**

11 (1) Plaintiff's Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 2.)

12 (2) As required by the accompanying Order to the appropriate government agency,
13 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.

14 (3) Plaintiff's motion for appointment of counsel, filed on September 12, 2011, is
15 **denied**. (Doc. 5.)

16 (4) Count II and Defendants Ryan, Credio, and Bradley are **dismissed** without
17 prejudice.

18 (5) Defendant Brown must answer Count I.

19 (6) The Clerk of Court must send Plaintiff a service packet including the
20 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
21 Defendant Brown.

22 (7) Plaintiff must complete⁴ and return the service packet to the Clerk of Court
23 within 21 days of the date of filing of this Order. The United States Marshal will not provide
24 service of process if Plaintiff fails to comply with this Order.

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27 ⁴ If a Defendant is an officer or employee of the Arizona Department of Corrections,
28 Plaintiff must list the address of the specific institution where the officer or employee works.
Service cannot be effected on an officer or employee at the Central Office of the Arizona
Department of Corrections unless the officer or employee works there.

1 (8) If Plaintiff does not either obtain a waiver of service of the summons or
2 complete service of the Summons and Complaint on a Defendant within 120 days of the
3 filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the
4 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv
5 16.2(b)(2)(B)(I).

6 (9) The United States Marshal must retain the Summons, a copy of the Complaint,
7 and a copy of this Order for future use.

8 (10) The United States Marshal must notify Defendants of the commencement of
9 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
10 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The**
11 **Marshal must immediately file signed waivers of service of the summons. If a waiver**
12 **of service of summons is returned as undeliverable or is not returned by a Defendant**
13 **within 30 days from the date the request for waiver was sent by the Marshal, the**
14 **Marshal must:**

15 (a) personally serve copies of the Summons, Complaint, and this Order upon
16 Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

17 (b) within 10 days after personal service is effected, file the return of service
18 for Defendant, along with evidence of the attempt to secure a waiver of service of the
19 summons and of the costs subsequently incurred in effecting service upon Defendant.
20 The costs of service must be enumerated on the return of service form (USM-285) and
21 must include the costs incurred by the Marshal for photocopying additional copies of
22 the Summons, Complaint, or this Order and for preparing new process receipt and
23 return forms (USM-285), if required. Costs of service will be taxed against the
24 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
25 Procedure, unless otherwise ordered by the Court.

26 (11) **A Defendant who agrees to waive service of the Summons and Complaint**
27 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

28 (12) Defendant must answer the Complaint or otherwise respond by appropriate

1 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
2 Rules of Civil Procedure.

3 (13) Any answer or response must state the specific Defendant by name on whose
4 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
5 does not identify the specific Defendant by name on whose behalf it is filed.


6 (14) Plaintiff is granted **60 days** from the filing date of this Order in which to
7 discover by subpoena or otherwise the identities of unknown Defendants Doe I, Doe II, and
8 III, and to file a “notice of substitution” providing the Defendant’ name in place of the
9 fictitious names for the unknown correction officers.

10 (15) The Clerk of Court must issue three subpoenas in blank and send them to
11 Plaintiff.

12 (14) The Clerk of Court must dismiss Doe I, Doe II, and Doe III for failure to
13 prosecute without prejudice and without further notice to Plaintiff, if Plaintiff fails to file a
14 “notice of substitution” of parties within 60 days from the filing date of this Order.

15 (15) This matter is referred to Magistrate Judge David K. Duncan pursuant to Rules
16 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
17 under 28 U.S.C. § 636(b)(1).

18 DATED this 28th day of October, 2011.

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22 Robert C. Broomfield
23 Senior United States District Judge
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